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Makesh Kumar/Ramanchandran v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-95–02 OF 2018
KAMARDIN HASHIM, KAMALUDIN MD SAID AND MOHAMAD ZABIDIN JJCA
20 MARCH 2019

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Criminal Procedure — Exhibit — Break in chain of evidence — Accused on drug trafficking charge alleged differences in weight of drug exhibit as recorded by the arresting officer, the investigating officer and the government chemist showed exhibit might have been tampered with — Whether prosecution satisfactorily explained discrepancies in the weight rendering the matter a non-issue — Whether accused's contention that bag containing drugs that he was carrying was not his was not credible — Whether accused's theory that someone swapped his bag with a similar-looking one while he was at the airport was far-fetched

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Shortly after he arrived at the Kuala Lumpur International Airport on a flight from Chennai, India, early one morning, the appellant, an Indian national, was stopped by two policemen on duty — PW2 and DW2 — who, after asking the appellant to produce his passport for inspection, requested him to open an untagged trolley bag he was lugging. On examining the bag, PW2 felt bulges at the base of the bag. The officers took the appellant and the bag to the narcotics office where a closer examination revealed that the bag had a false bottom underneath which was a compartment that contained a packet full of a crystalline substance. The substance was later found to contain 644.8g of methamphetamine. The appellant was charged with drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). At the trial, the appellant's main contentions were that: (a) the bag did not belong to him and that someone must have swapped his bag with a similar-looking one while he was at the airport; and (b) the difference in weight of the drug exhibit as recorded by PW2 (the arresting officer), PW4 (the investigating officer) and PW3 (the chemist) created strong suspicion that the exhibit might have been tampered with. PW2 had recorded the weight as 1,000g, PW4 had recorded it as 837.5g while PW3 testified that the actual weight of the methamphetamine in the exhibit was only 644.8g. The trial court ruled that the prosecution had satisfactorily explained the differences in the weight of the drug exhibit and that the appellant's denial that the bag was his was an afterthought because he never made that denial when PW2 and DW2 had asked him to open the bag for inspection at the airport. The court rejected all the defences of the appellant, found that he had failed to rebut the presumptions of possession and trafficking invoked against him under s 37(d) and (da), respectively, of the DDA, and convicted and sentenced him to death. In his instant appeal against

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the conviction and sentence, the appellant raised the same issues that he had argued before the trial court. A

Held, unanimously dismissing the appeal and affirming the conviction and sentence:

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(1) Based on the totality of the evidence, the surrounding circumstances and the probabilities of the case, the charge against the appellant was proven beyond reasonable doubt. His conviction was safe and was amply supported by the cogent and overwhelming evidence on record. There was no appealable error or misdirection on the part of the trial judge which warranted appellate intervention (see paras 59 & 61). C

(2) There was no break in the chain of evidence of the prosecution's case. The trial judge had correctly found that the difference in the weight of the drug exhibit was satisfactorily explained by PW2 who said that he had used an uncalibrated weighing scale. His evidence was accepted as reliable and consistent with the other witnesses for the prosecution. The net weight of the methamphetamine after analysis by the chemist, PW3, was 644.8g as stated in the charge against the appellant. The weight of 837.5g was the net weight of the crystalline substance but not yet the weight of the methamphetamine after all proper analysis had been done. The discrepancy in the weight of the drug exhibit therefore did not cause any dent in the prosecution's case (see paras 36 & 42). D E

(3) There was no merit to the issue of discrepancy on the identity of the bag. The appellant contended that his bag might have been switched by someone when he left it unattended when SP2 asked him to step aside to check his passport. The appellant conceded that he did not raise that contention either in his witness statement or disclose it at the prosecution's stage of the trial by putting it to PW2 when the latter was being cross-examined. The appellant's testimony was also contradicted by DW2 who said that the appellant only complained that the bag was not his while he was being escorted to the narcotics office at the airport and not as soon as PW2 told him to open the bag for inspection. The trial judge correctly found that there was no plausible reason for anyone to take the appellant's bag or any reason for PW2 and DW2 to falsely implicate the appellant. The trial court rightly held that the appellant's defence on this issue was belated and an afterthought (see paras 20, 24, 49, 51 & 53). F G H

(4) The prosecution was entitled to rely on the oral evidence of PW2 to establish that the bag was seized from the appellant and that it contained the drugs. There was no requirement in law that PW2's evidence had to be corroborated by independent evidence as his evidence was cogent and consistent with the other evidence in the case (see para 57). I

[Bahasa Malaysia summary

Sejurus selepas dia tiba di Lapangan Terbang Antarabangsa Kuala Lumpur dengan penerbangan dari Chennai, India, awal suatu pagi, perayu, seorang warganegara India, telah ditahan oleh dua orang polis yang bertugas — PW2 dan DW2 — yang mana, selepas meminta perayu mengemukakan pasportnya untuk pemeriksaan, memintanya membuka beg troli yang tiada tanda nama yang dibawanya. Semasa memeriksa beg itu, PW2 merasa bonjolan pada dasar beg itu. Pegawai polis tersebut membawa perayu dan beg itu ke pejabat narkotik di mana pemeriksaan lebih teliti menunjukkan bahawa beg itu mempunyai bahagian bawah yang palsu di mana terdapat bahagian yang mengandungi bungkusan penuh dengan bahan kristal. Bahan itu kemudian didapati mengandungi 644.8g methamphetamine. Perayu telah dituduh mengedar dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Semasa perbicaraan, hujah utama perayu adalah bahawa: (a) beg itu bukan miliknya dan bahawa seseorang telah menukar begnya dengan beg yang serupa semasa dia di lapangan terbang; dan (b) perbezaan berat ekshibit dadah sebagaimana direkodkan oleh PW2 (pegawai tangkapan), PW4 (pegawai penyiasat) dan PW3 (ahli kimia) menimbulkan syak bahawa ekshibit itu mungkin telah diusik. PW2 telah merekodkan berat sebanyak 1,000g, PW4 telah merekodkannya sebanyak 837.5g manakala PW3 memberi keterangan bahawa berat sebenar methamphetamine dalam ekshibit itu hanya 644.8g sahaja. Mahkamah perbicaraan memutuskan bahawa pendakwaan telah menjelaskan dengan memuaskan perbezaan berat ekshibit dadah itu dan bahawa penafian perayu yang beg itu adalah miliknya merupakan suatu yang telah difikirkan kemudian kerana dia tidak pernah membuat penafian semasa PW2 dan DW2 memintanya membuka beg itu untuk pemeriksaan di lapangan terbang. Mahkamah menolak kesemua pembelaan perayu, mendapati bahawa dia telah gagal mematahkan andaian milikan dan pengedaran yang digunakan terhadapnya di bawah s 37(d) dan (da), masing-masingnya, ADB tersebut, dan mensabit dan menjatuhkannya hukuman mati. Dalam rayuannya terhadap sabitan dan hukuman, perayu menimbulkan isu-isu yang sama yang telah dihujahkannya di hadapan mahkamah perbicaraan.

Diputuskan, sebulat suara menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Berdasarkan keseluruhan keterangan, keadaan sekeliling dan kebarangkalian kes, pertuduhan terhadap perayu telah dibuktikan melampaui keraguan munasabah. Sabitannya adalah selamat dan mencukupi untuk disokong oleh keterangan yang meyakinkan dan banyak atas rekod. Tiada kekhilafan yang boleh dirayu atau salah arah di pihak hakim perbicaraan yang mewajarkan campur tangan rayuan (lihat perenggan 59 & 61).

(2) Rantaian keterangan kes pendakwaan tidak terputus. Hakim perbicaraan dengan betul mendapati abhawa perbezaan dalam berat ekshibit dadah itu telah dijelaskan dengan memuaskan oleh PW2 yang menyatakan bahawa dia telah menggunakan penimbang berat yang tidak ditentukur. Keterangannya telah diterima sebagai boleh dipercayai dan konsisten dengan saksi-saksi lain untuk pendakwaan. Berat bersih methamphetamine itu selepas analisis oleh ahli kimia, PW3, adalah 644.8g sebagaimana dinyatakan dalam pertuduhan terhadap perayu. Berat 837.5g adalah berat bersih bahan kristal itu tetapi masih belum berat methamphetamine selepas semua analisis yang sewajarnya dibuat. Percanggan tentang berat ekshibit dadah itu oleh demikian tidak menyebabkan apa-apa kecacatan dalam kes pendakwaan (lihat perenggan 36 & 42).

(3) Tiada merit tentang isu percanggahan identiti beg itu. Perayu menegaskan bahawa begnya mungkin telah tertukar dengan seseorang semasa dia meninggalkannya tanpa pengawasan apabila SP2 memintanya untuk ketepi bagi memeriksa pasportnya. Perayu berhujah bahawa dia tidak menimbulkan hujah itu sebelum ini sama ada dalam kenyataan saksinya atau mengemukakannya di peringkat pendakwaan semasa perbicaraan dengan mengemukakannya kepada PW2 semasa PW2 diperiksa balas. Keterangan perayu juga bercanggah dengan DW2 yang menyatakan bahawa perayu hanya mengadu bahawa beg itu bukan miliknya semasa dia diiringi ke pejabat narkotik di lapangan terbang dan bukan sejurus selepas PW2 memberitahunya untuk membuka beg itu untuk pemeriksaan. Hakim perbicaraan dengan betul telah mendapati bahawa tiada sebab munasabah untuk seseorang mengambil beg perayu atau apa-apa sebab untuk PW2 dan DW2 untuk menuduh perayu secara salah. Mahkamah perbicaraan sewajarnya telah memutuskan bahawa pembelaan perayu berhubung isu ini adalah suatu yang dilengah-lengahkan dan telah difikirkan kemudian (lihat perenggan 20, 24, 49, 51 & 53).

(4) Pendakwaan berhak untuk bergantung kepada keterangan lisan PW2 bagi membuktikan bahawa beg itu telah dirampas daripada perayu dan bahawa ia mengandungi dadah. Tiada keperluan dari segi undang-undang yang keterangan PW2 perlu disokong oleh keterangan berasingan kerana keterangannya adalah meyakinkan dan konsisten (lihat perenggan 57).]

Notes

For cases on evidence in general, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2402–2404.

Cases referred to

Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Hasbala Mohd Sarong v PP [2013] 6 MLJ 636; [2013] 6 CLJ 945, FC (refd)
Lai Kim Hon & Ors v PP [1981] 1 MLJ 84, FC (refd)
Lew Wai Loon v PP [2014] 3 MLJ 325; [2014] 2 CLJ 649, FC (refd)
Loh Kah Loon v PP [2011] 4 MLJ 260; [2011] 5 CLJ 345, FC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
Mazlan bin Mustaffa v Pendakwa Raya [2015] MLJU 2127, CA (refd)
Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241; [2003] 2 CLJ 65, CA (refd)
Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64; [1980] 1 MLRA 283, PC (refd)
Ooi Hock Kheng v PP [2014] 5 MLJ 585; [2014] 1 LNS 685, CA (refd)
Pendakwa Raya lwn Bazleh Saeid Saleh dan satu lagi [2014] 5 MLJ 816, CA (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561; [1992] 4 CLJ 2086, SC (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576, HC (refd)
PP v Wan Razali Kassim [1970] 2 MLJ 79, FC (refd)
Saeid Reza Mohammadi Mohammad lwn Pendakwa Raya [2016] 4 MLJ 22, CA (refd)
Seyedalireza Seyedhedayatollah Ehteshamiardestani v PP [2014] 6 MLJ 408, CA (refd)
Tan Yew Choy v PP [2010] 5 MLJ 212, FC (distd)
Teoh Hoe Chye v PP; Yeap Teong Tean v PP [1987] 1 MLJ 220, SC (refd)
Yeong Kia Heng lwn Pendakwa Raya [1992] 1 MLJ 327, SC (consd)

Legislation referred to

Criminal Procedure Code s 180
Dangerous Drugs Act 1952 ss 2, 37(d), (da), (da)(vi), (da)(xvi), 39B(1)(a), First Schedule

T Selvadorai (Palaya & Partners) for the appellant.
Dhiya Syazani Izyan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Kamaludin Md Said JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant was convicted and sentenced to death by the High Court at Shah Alam on the following amended charge:

> Bahawa kamu pada 28 November 2014, jam lebih kurang 1.05 pagi, bertempat di kawasan Tuntutan Bagasi 8, Aras 2, Ketibaan Antarabangsa KLIA 2, di dalam

Daerah Sepang, di dalam Negeri Selangor Darul Ehsan, telah melakukan kesalahan memperedarkan dadah berbahaya iaitu Methamphetamine seberat 644.8 gram dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 39B (1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B (2) Akta yang sama.

[2] Aggrieved by the conviction and sentence, the appellant appealed to the Court of Appeal. We heard the appeal on 28 February 2019, at the end of which we unanimously dismissed the appeal and we affirmed the conviction and sentence. We now give our reasons.

FACTS OF THE CASE

[3] Briefly, the factual scenario which led to the arrest of the appellant on 28 November 2014 were as follows:

(a) at about 1am on 28 November 2014, the appellant arrived at Kuala Lumpur International Airport 2 (KLIA 2) on board Air Asia Flight AK 12 from Chennai. On that day, Sub Insp Ghazali bin Mohd Din ('PW2') was on duty at KLIA 2 with a team of police officers;

(b) at about 1.05am, PW2 spotted the appellant near the customs checking counter pulling a 'Leaves King' brown trolley bag ('exh P13'). He looked nervous. Whereupon, PW2 and one Sgt Paneer Chelvam ('DW2') approached the appellant and introduced themselves;

(c) the appellant was asked to produce his passport. After examining his passport, PW2 noticed that exh P13 was not locked and carried no baggage tag, indicating that it was not checked in luggage. He asked the appellant to open it and the latter complied;

(d) inside exh P13 there were six sarees (exh P15) and a white shirt (exh P14). PW2 put his hand into exh P13 and felt bulges at the base. The appellant was asked to close exh P13 and was escorted by Sgt Paneer Chelvam and PW2 to the narcotics office;

(e) there, Sgt Paneer Chelvam conducted a body search on the appellant and no incriminating items were found. The appellant was then asked to open and empty exh P13. In his presence, PW2 carried out a thorough examination of the bag. Under the lining at the base of the bag was a hard covering that he unscrewed and removed;

(f) on it being removed, he saw a black canvass package (exh P17) glued to a piece of small plywood in a specially constructed compartment at the base. Inside the black canvas package was a clear plastic bag wrapped in blue carbon paper. He made a slit on the plastic package and found crystalline substance therein suspected to be drugs;

(g) the appellant was arrested and the items found in his possession were seized;

(h) PW2 then labelled the items seized by recording the date and placing his signature on them and prepared a search list (exh P6) which he served on the appellant. He then lodged a police report about the arrest. At about 4.40am on the same day, the appellant and the items seized were handed by PW2 to Insp Haryati bt Zahruddin (PW4), the investigating officer in this case;

(i) under cross-examination, PW2 acknowledged that no personal items of the appellant were found in exh P13. PW2 also acknowledged that he was unaware if the appellant had told Sgt Paneer Chelvam that the bag did not belong to him. PW2 denied the suggestion that the appellant was walking in a group with five other passengers when he approached him to check his bag. He maintained that the appellant was alone at that time;

(j) the next witness was the investigating officer who testified that after receiving the items seized from PW2, she placed her initials on them and kept the exhibits in her locker, to which no one had access. On 1 December 2014, she placed the package in a box P16 and sent it to government chemist Suhana bt Ismail (PW3) for analysis;

(k) on 17 March 2015, she received the exhibits back and chemist report P7 dated 2 February 2015 confirming that the substance found in the bag was methamphetamine; and

(l) under cross-examination, the investigating officer further acknowledged that no personal items of the appellant were found in exh P13. She also acknowledged that the exhibits were not sent for finger print lifting or DNA testing. She explained that this was not done as the appellant was caught red handed with the drugs.

FINDINGS AT THE END OF THE PROSECUTION'S CASE

[4] The finding of learned judge at this stage can be found in her grounds of judgment at p 19 of the appeal record (Vol (1)) where she held as follows:

> Thus, at the close of prosecution's case, I was satisfied, upon a maximum evaluation of the evidence adduced by the prosecution's witnesses that the prosecution had made out a prima facie case against the accused in respect of the charge which, if unrebutted, would warrant his conviction. As such, the accused was called to enter his defence.

[5] The law in s 180 of the Criminal Procedure Code ('the CPC') is very clear that the duty of the judge to determine at the close of prosecution case, whether the prosecution has made out a prima facie case must subject the prosecution evidence to maximum evaluation (see: *Looi Kow Chai & Anor v*

Public Prosecutor [2003] 2 MLJ 65).

[6] The appellant was charge under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') which is an offence of traffic in dangerous drug. Section 2 of the Act sets out the acts that constitute trafficking which includes transporting, carrying, distributing and etc any dangerous drug.

[7] The prosecution must prove that the appellant had possession of the drugs (see: *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705). There are two elements to possession ie physical element that the substance was in the custody of the appellant or subject to his control and mental element that the appellant had knowledge that he was in possession of the impugned drugs (see: *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 and *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576).

[8] The prosecution can prove either actual possession or presumed possession under s 37(d) of the Act. To sustain a charge of trafficking the prosecution can prove actual trafficking under s 2 of the Act or presumed trafficking under s 37(da) of the Act (see: *Saeid Reza Mohammadi Mohammad lwn Pendakwa Raya* [2016] 4 MLJ 22 and *Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor* [2014] 6 MLJ 408). To establish actual trafficking, the prosecution must show that the appellant committed the acts mentioned in s 2 of the Act for the purpose of distributing the drugs to others (see: *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241; [2003] 2 CLJ 65, *Ooi Hock Kheng v Public Prosecutor* [2014] 5 MLJ 585; [2014] 1 LNS 685 and *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64; [1980] 1 MLRA 283).

[9] In the present case, the prosecution must prove that the substance found in the bag was dangerous drugs within the definition of s 2 of the Act, the appellant had mens rea possession of the drugs ie he had custody and control of the drugs and knowledge that it was dangerous drugs and the drugs were in the possession of the appellant for purpose of trafficking.

[10] Having set out the ingredients of the offence and after examining the evidence adduced by the prosecution, the learned judge was satisfied that there was no break in the chain of evidence and that the substance analysed by PW3, Suhana bt Ismail, the government chemist, was in fact the substance recovered from the bag. The unchallenged evidence of PW3 established that the substance contained 644.8g of methamphetamine, a dangerous drug listed in the First Schedule of the Act.

[11] The learned judge accepted PW2's evidence as reliable and consistent with the other evidence in the case. PW2 was the arresting officer and his

A evidence established that the appellant had physical custody or control of exh P13 and the bag contained the drugs, the subject matter of the charge against him.

B **[12]** Accordingly, the learned judge found that this triggered the presumption under s 37(d) of the Act. By virtue of the presumption, the appellant was presumed to have possession and knowledge of the nature of the drugs found in exh P13. As the quantity of drugs found in the possession of the appellant was well above the 50g threshold that further attracted the trafficking presumption under s 37(da)(xvi) of the Act.

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[13] The appellant was thus presumed to have these drugs in her possession for the purposed of trafficking.

D **[14]** The learned judge had considered the points raised by the defence at the end of prosecution case that there was a discrepancy in the evidence of PW2 and the chemist as regards the weight of the drugs found in exh P13, there were several unexplained tears on the package produced in court and the failure of the prosecution to send exh P13 and the package found inside it for DNA E analysis and fingerprint lifting, and to produce the airport CCTV footage.

[15] The learned judge agreed that there was a discrepancy but that was satisfactorily explained by PW2, who said that the weighing scale used by him was not calibrated. She held that the discrepancy in the weight of drugs did not F cause any dent in the prosecution's case.

[16] The learned judge had made careful examination of the plastic package containing the drugs and found that there was no factual basis for the complaint made by counsel as there was only one tear on the said package. The G learned judge found no merit in this submission as the prosecution was entitled to rely on the oral evidence of PW2 to establish that exh P13 was seized from the appellant and that it contained the drugs. There is no requirement in law for PW2's evidence to be corroborated by independent evidence as his evidence was cogent and consistent with the other evidence.

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[17] Upon a maximum evaluation of the evidence adduced before the court at the close of the prosecution case, the court found that a prima facie case has been made out against the appellant. As such, the appellant was called upon to enter his defence.

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THE DEFENCE'S CASE

[18] The appellant chose to give evidence under oath. His defence was as follows:

(a) the appellant was married with two children and lived in India. He worked there as a construction labourer and earned a monthly salary of about 640 Ringgit Malaysia;

(b) his purpose of coming to Malaysia was to visit his relatives and to accompany his wife's sister who was residing in Malaysia back to India. His trip to Malaysia was only for two days and his return flight to India was on 30 November 2014;

(c) he recalled his movements on the date he left for Malaysia. He went to a temple to pray and from there went to a shop to purchase a light brown Polo luggage bag to bring along with him. He put his personal items, underwear and toiletries in this bag and locked it. He brought it with him on the flight. He kept the receipt for the purchase of the Polo bag and the key in his wallet;

(d) on arrival at KLIA, as he was leaving the baggage reclaim area and walking towards customs, he noticed five Indian passengers walking near him. They consisted of three Malaysian Indians and two Indian nationals. He proffered no explanation as to how he determined their nationality and religion. As he reached the customs counter with these five passengers, PW2 approached him, and asked him to produce his passport. Having examined his passport, PW2 next asked him to open his bag. At this juncture, he realised that the bag (P13) was not his and promptly informed Sgt Panner Selvam of the same; and

(e) under cross-examination, the appellant denied that P13 was the bag he had brought from India or that he knew there were drugs inside it. He explained that his bag was a lighter shade of brown as compared to exh P13 and was of a different design. He said that his bag was switched with P13 when he left it unattended upon PW2 asking him to step aside to check his passport. He acknowledged that this fact was not in his witness statement and was also not put to PW2 during cross-examination.

FINDINGS AT THE END OF THE DEFENCE CASE

[19] The learned judge had analysed the defence evidence and found the gist of the defence of the appellant was that exh P13 was not the bag he had brought from India. His luggage had been switched with exh P13 by someone, whilst he was at the customs. The learned judge found this defence was in conflict with the prosecution. Hence, there were two conflicting versions in respect of the drugs found in exh P13. The prosecution's version that the appellant had brought the drugs into Malaysia in exh P13. The appellant's version that exh P13 was not his bag.

[20] Having considered both versions, the learned judge found it impossible

to give the slightest credence to the appellant's version. There was no plausible reason for anyone to take the appellant's bag and switch it with exh P13. In any event, the testimony of the appellant that exh P13 was not his bag was contradicted by his sole witness, Sgt Paneer Chelvam (DW2).

[21] The learned judge was satisfied that many aspects of the appellant's evidence cast doubt about the authenticity of his account as to how he lost his bag. He maintained there were five passengers beside him at the customs but significantly in his evidence did not suggest that one of them had taken his bag. It was therefore unclear as to why he referred to these five passengers in his evidence.

[22] The failure by the appellant to put forth his case at the earliest possible stage rendered his defence an afterthought. There was no explanation by the appellant for the belated disclosure of his defence. Clearly by raising it at the eleventh hour and only at the defence stage, no opportunity was given to the prosecution to verify its truthfulness (see: *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561; [1992] 4 CLJ 2086).

[23] On the evidence, the learned judge found that it was patently obvious that the appellant's story as to how his bag was switched with exh P13 was an invention by the appellant to distance himself from any knowledge that he might have had as to its contents. His version was shown to be untrue by the unchallenged testimony his own witness, Sergeant Paneer Chelvam.

[24] The learned judge was wholly satisfied having seen PW2 and Sergeant Paneer Chelvam (DW2) gave evidence and having tested it against the totality of the evidence that they were witnesses of truth. They had no reason to falsely implicate the appellant with exh P13. If indeed the appellant's version was true, he would have realised that exh P13 was not his bag as soon as he was asked by PW2 to open it at the customs counter. A reasonable person in his position would have notified PW2 and Sergeant Paneer Chelvam immediately of the switch.

[25] The appellant claimed that he did inform Sgt Paneer Chelvam at that point, but the latter contradicted his evidence and said that he only did so when he was being led to the narcotics office.

[26] For the reasons given, the learned judge found the appellant's story that exh P13 was not the bag that he had brought from India implausible and a complete fabrication.

[27] For these reasons, the learned judge found that the evidence of the appellant failed to rebut the statutory presumptions of possession and

trafficking that operated against him nor cast a reasonable doubt as to the truth of the prosecution's case. The prosecution had succeeded in proving the charge of trafficking beyond reasonable doubt against the appellant.

[28] The appellant was thus found guilty and convicted of the charge and the appellant was sentenced to death.

THE APPEAL

[29] The appellant and the respondent had filed in their written submissions and also made oral submissions. We noted that the appellant raised similar issues that were raised before the learned judge at the High Court ie the discrepancies in the gross weight of the drugs, the identity of the bag and several unexplained tears on the plastic package produced in court.

[30] Having heard the appeal, we found no merit in the grounds raised by the appellant before us as above.

[31] Firstly, we found the appellant's whole argument actuall centered only on one issue that was to establish break in chain of the prosecution's case premised on the discrepancy of the identity of the drugs found inside the said bag which is the subject matter of the charge. Secondly, the issues raised as a whole involved the question of facts by the learned judge.

[32] The appellant referred to the evidence of PW2, PW3 and PW4 during the prosecution case where PW2 agreed that the gross weight of the drugs was *1,000g*, PW3 stated that the weight was *837.5g* as found in exh P7, the chemist report and after analysis the weight was *644.8g*, PW4 stated that the drugs sent to the chemist for analysis was *837.5g* and after analysis it was *644.8g*. There was discrepancy between the weight of the drugs between 1,000g, 837.5g and 644.8g.

[33] The appellant submitted that based on the discrepancy, it can be inferred that the drugs seized by the police at KLIA 2 and the drugs sent to the chemist and the drugs produced in court was not the same drugs found inside the bag (P13). There was serious doubt on the identity of the drugs. In other words, the drugs exhibit had been tampered with. There were gap and break in the chain of evidence in the prosecution's case relying on the Supreme Court case of *Teoh Hoe Chye v Public Prosecutor; Yeap Teong Tean v Public Prosecutor* [1987] 1 MLJ 220, which held that where a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. The appellant also relied on *Tan Yew Choy v Public Prosecutor* [2010] 5 MLJ 212 and *Yeong Kia Heng lwn Pendakwa Raya* [1992] 1 MLJ 327 where the courts held that the

discrepancies in the weight as found by the police and the chemist was fatal.

[34] In reply, the learned DPP submitted that the only relevant weight here is the gross weight of the drugs and the plywood which was stucked to the plastic containing the drugs when it was recovered by the raiding officer (PW2 — Det Sgt Ghazali bin Mat Din) which was 1,000g as it was weighed using an uncalibrated weighing machine. The net weight of the drugs, methamphetamine, after being analysed by thechemist (PW3 — Suhana bt Ismail) was 644.8g being the subject matter of the charge against the appellant. The weight of 837.5g was the net weight of the crystal clear substance received but not yet the weight of the methamphetamine after all proper analysis done.

[35] The learned DPP relied on the case of *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636; [2013] 6 CLJ 945. In this case, the prosecution witness PW6 found the gross weight of the drug exhibits to be 4,860g while PW3 found it to be 4,688.15g. Thus, there was a difference of 171.45g. The court was of the view that an explanation by the prosecution would have been desirable, but on the facts and circumstances of this case, the court have no doubt that the drug exhibits seized from the appellant and as examined by the chemist were the same drug exhibits that the appellant was charged with.

[36] We found that there is no merit in the issue raised by the appellant. We were satisfied that there was no break in chain of evidence of the prosecution' case. The learned judge had dealth with the point raised by the appellant at para 25 of her grounds of judgment at pp 17–18 of the appeal record (Vol (1)). We noted that although the learned judge in her finding of fact agreed that there was a discrepancy regarding the weight but the difference of the weight was satisfactorily explained by PW2, who said that the weighing scale used by him was not calibrated. The evidence of PW2 was accepted as reliable and consistent with other prosecution's witnesses. She held that the discrepancy in the weight of drugs therefore did not cause any dent in the prosecution's case.

[37] We had considered the Supreme Court case of *Yeong Kia Heng lwn Pendakwa Raya* relied by the appellant. In this case, the police officer's (SP5) gave evidence that the weight was 113g and the chemist's (SP2) gave evidence that when the drugs was recived from the police, the weight was 102.85g. There was a different of 10g. The court held that based on the evidence there was serious doubt on the identity of the drugs and defence was not called. Similarly, in *Tan Yew Choy v Public Prosecutor* [2010] 5 MLJ 212, the Federal Court held that the appellant has shown there is a discrepancy in that the nett weight of cannabis as determined by the chemist exceeded the gross weight of the cannabis when they were first recovered by the police. It would therefore follow that the prosecution cannot be said to have proven the offence of trafficking beyond reasonable doubt against the appellant. However, we noted

that the court further held that a reasonable doubt has been created as to whether the cannabis that was recovered by the police that was sent to the chemist for analysis is the same substance that is found to be cannabis and it is in respect of that substance that the appellant is charged with trafficking.

[38] The facts of the case in *Tan Yew Choy* in our view is different and can be distinguished with the facts in the present case. The court held that the discrepancies in the weight as found by the police and the chemist was fatal because the total weight 'by the time the cannabis reached the hands of the chemist' had increased in weight by 19.65g. But another flaw in the case was that, the investigating officer did not explain the movement of the cannabis from the time he received and weighed them on 25 February 2005 until he placed them in a box on 27 February and sent it to the chemist on 28 February. In fact, in Tan Yew Choy, the pertinent issue was more on the failure of the trial judge in not resolving the doubt as to the weight of the cannabis as the weight of the cannabis involved was within the borderline amount that can trigger the statutory presumption of trafficking under s 37(da)(vi) of the Act.

[39] In the present case, we were satisfied with the finding of the learned judge that the difference of the weight was satisfactorily explained by PW2 and consistent with other witnesses. The discrepancy in the weight of drugs did not cause any break in chain in the prosecution's case.

PW2's (arresting officer) evidence is as follows:

Examination-in-chief (p 70 of the appeal record (Vol (2))):

> 15: Saya kemudiannya telah menimbang bungkusan plastik lutsinar sekeliling berbalut dengan kertas karbon biru beserta dengan papan lapis (*plywood*) tadi. Anggaran berat adalah 1000 gram

Cross-examination (pp 18–19 of the appeal record (Vol (2))):

> S: Rujuk perenggan 15 penyata saksi kamu, 1000 gram ini telah ditimbang oleh kamu?
>
> J: Ya
>
> S: 1000 gram itu hanya dadah itu sahaja?
>
> J: Ya
>
> S: Kamu gunakan weight machine ketika timbang, betul?
>
> J: Ya
>
> S: Di mana weight machine itu sekarang?
>
> J: Ada di pejabat.

S: Ada ambil gambar weight machine itu?

J: Saya tidak tahu.

S: Bila kali terakhir weight machine itu dikalibrasikan atau diselenggarakan?

J: Ia tidak pernah diselengarakan

S: Kamu tidak bolih beritahu secara tepat sama ada mesin itu berfungsi dengan baik atau tidak. Setuju?

J: Setuju

S: Jadi 1000 gram ini kamu tidak pasti, pada masa itu figure yang kamu nampak, betul?

J: Itu ialah bacaan saya.

S: Bila dihantar kepada Pegawai Penyiasat pada hari yang sama, berapa gram yang dihantar?

J: 1000 gram

S: Berapa lama barang itu berada dengan kamu?

J: Sepanjang masa daripada OKT ditahan sehingga diserah kepada Pegawai Penyiasat

PW3's (chemist) evidence is as follows:

Examination-in-chief (p 72 of the appeal record (Vol (2))):

Saya telah memeriksa kotak 'HZ' dan mendapati di dalamnya satu bungkusan kanvas berwarna hitam yang melekat pada papan lapis (*plywood*) kecil di dalamnya berisi satu bungkusan plastik lutsinar yang dibalut kertas karbon biru berisi 837.5 gram (berat bersih) bahan kristal jernih. Setelah dianalisis saya mendapati bahan tersebut mengandungi 644.8 gram Methampethamine

The same examination and analysis is found in exh P7 (chemist report) (p 35 of the appeal record (Vol (3))):

Cross-examination (p 28 of the appeal record (Vol (2))):

S: Rujuk P7, berat dadah yang diterima ialah 837.5 gram, setuju?

J: Ya, itu ialah berat bersih bahan kristal jernih S: Ianya tidak termasuk plywood, setuju?

J: Setuju

S: Selepas dianalisa ianya mengandungi 648.8 gram, setuju?

J: Bahan itu mengandungi 644.8 gram metampethamine

[40] PW4's (investigating officer) evidence during examination-in-chief (pp 76–78 of the appeal record (Vol (2))), inter alia, stated that on 28 November 2014 he received the exhibits from PW2, D/SI Ghazali bin Md Din, marked the exhibits and kept the exhibits inside the metal locker in his office. Later she directed the photographer, D/KPL Razaimy bin Razak to take the picture of the exhibits. 14 photographs of the exhibits were taken and then placed the exhibits back in metal locker except a black canvas package glued to a small plywood, inside it contained a transparent plastic wrapped with blue ribbon paper containing crystal substance suspected to be syabu. The black canvas package containing the drugs syabu was placed inside a box marked 'HZ' and sealed with police seal 'POLIS DIRAJA MALAYSIA 651'. He prepared Form POL 31 to be submitted to the chemistry department for analysis of the drugs exhibit to determine the net weight and type of drugs. On 1 December 2014 she handed over the said box marked 'HZ' and Form POL 31 to the chemist on duty, Puan Suhana bt Ismail.

[41] The evidence of PW4 during cross-examination is at p 33 of the appeal record (Vol (2)) as follows:

S: Rujuk perenggan 2 penyata saksi kamu, kamu telah menerima rampasan dadah dengan anggaran beratnya ialah 1000 gram, setuju?

J: Setuju

S: 1000 gram ini telah ditimbang oleh pegawai tangkapan, betul?

J: Betul

...

S: Rujuk P7 perenggan 2, dadah yang telah dihantar ke Jabatan Kimia beratnya ialah 837.5 gram, setuju?

J: Kalau ikut laporan ini saya setuju

S: Dan selepas dianalisa hasilnya ialah 644.8 gram meth, setuju?

J: Setuju

S: Ada 3 angka di sini, iaitu pegawai tangkapan membuat timbangan 1000 gram, Jabatan Kimia menerima 837.5 gram dan selepas dianalisa 644.8 gram, setuju?

J: Kalau ikut fakta itu saya setuju.

S: Dadah yang dirampas dan yang diterima dan seterusnya yang dihantar ke Jabatan Kimia bukan dadah yang ada di Mahkamah hari ini, setuju?

J: Tidak setuju.

S: Selepas menerima barang kes kamu telah membuat tandaan, betul?

J: Betul

A **[42]** Based on the evidence, we agreed with the learned DPP that the only relevant weight in this case is the gross weight of the drugs and the plywood which was stucked to the plastic containing the drugs when it was recovered by PW2 which was 1,000g as it was weighed using an uncalibrated weighing machine. The net weight of the drugs methamphetamine after being analysed B by the chemist PW3 was 644.8g being the subject matter of the charge against the appellant. The weight of 837.5g was the net weight of the crystal clear substance received but not yet the weight of the methamphetamine after all proper analysis done. The learned judge did not err when she agreed that there was a discrepancy regarding the weight but the difference of the weight was C satisfactorily explained by PW2, who said that the weighing scale used by him was not calibrated. The discrepancy in the weight of drugs therefore did not cause any dent in the prosecution's case. We were satisfied that drugs recovered by the police that was sent to the chemist for analysis is the same substance that D was produced in court and which was the subject matter of the charge.

[43] In the Federal Court case of *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636; [2013] 6 CLJ 945 cited by the learned DPP, there was a difference of 171.45g in the gross weight. The court was of the view that an E explanation by the prosecution would have been desirable, but on the facts and circumstances of this case, the court have no doubt that the drug exhibits seized from the appellant and as examined by the chemist were the same drug exhibits that the appellant was charged with. The difference in the gross-weight which is 171.45g less could be due to the fact that the drug exhibits were weighed by F PW3 nearly three months after the drug exhibits were weighed by PW6. The court took judicial notice that environmental factors such as climate condition and humidity can attribute to the difference in weight of the impugned drug exhibits.

G **[44]** It was also held that the weighing process by the police is not the determining factor in the weight of the drugs, rather it is the weighing done by the chemist which determines the actual weight of the drugs and forms the basis of the charge. It is common knowledge that the weighing process undertaken by the police after the seizure of the drugs is only for classification H purposes in the determination of the charge that will be most likely to be preferred against the accused and/or arrested person. More often than not the disparity in weight of the drugs recorded is inevitable due to difference weighing methods preferred and the difference weighing apparatus used by the police force and the chemist department.

I **[45]** The Federal Court referred to its earlier decision in *Loh Kah Loon v Public Prosecutor* [2011] 4 MLJ 260; [2011] 5 CLJ 345, which upheld the decision of the courts below even though there existed a discrepancy in the weight of the drug exhibits as found by the police and the chemist. In that case

the High Court as well as the Court of Appeal found it as a fact that there was no doubt in the identity of the drug exhibits because the evidence before the court showed there was no break in the chain of evidence. The movement of exhibits was clearly explained, and the markings on the drug exhibits were positively identified by the witnesses. The courts below were satisfied that the drug exhibits that were seized from the appellant were the same exhibits produced in the High Court.

[46] Similarly, on the facts and circumstances of the present case, we were of the view that the difference in weight of the drug exhibits by itself as found by the PW2 and the PW3 is not sufficient to create a reasonable doubt to the prosecution's case. We have no doubt that the drug exhibits seized from the appellant and as examined by the chemist were the same drug exhibits that the appellant was charged with. There was no break in the chain of evidence and the drug exhibits were positively identified by the prosecution witnesses in particular PW2, PW4, and PW3.

[47] Another relevant decision is the Federal Court decision in the case of *Lew Wai Loon v Public Prosecutor* [2014] 3 MLJ 325; [2014] 2 CLJ 649 which decided as follows:

> [45] In relation to the differences in the weight given, the respective relevant witnesses gave their versions of the event including the reasons for weighing the drug exhibit.
>
> [46] SP9 made it clear that a bag together with the drug exhibit were given to him by SP7 for fingerprint tracing. Upon receipt he used an uncalibrated weighing machine to weigh the drug exhibit. He took the weight in relation to tracing for fingerprint. He learned from a course he attended that the weight of a thing could affect the result in determining fingerprint on it. Thus, the weight he obtained was immaterial in determining the offence the appellant would finally be charged with. Hence, there was actually no necessity for him to explain. Nevertheless, his explanation on the weight issue could be inferred from the fact that he used uncalibrated weighing machine. Further, there was also no challenge that he received the drug exhibit from SP7.
>
> [47] As for SP7 he said that he received the drug exhibit from SP1. Again there was no serious challenge on this issue. SP7 weighed them merely to countercheck on the weight as given by SP1. He was not sure whether the weighing machine he used was calibrated. Being the investigating officer it would be necessary for SP7 to know the estimated weight of the drug seized by SP1 as the weight would assist him to determine the nature of the offence committed and the course to take in his investigation of the case.
>
> [48] The person who seized the drug exhibit and other items from the appellant was SP1. Before passing the same to SP7 he marked the items seized and he also weighed the drug exhibit, an exercise that was not necessary for him to do. As such the weight he obtained was also immaterial. Thus, there was no necessity for him to explain on

A the discrepancy between the weight he obtained and the weight obtained by SP3. Nevertheless, the use of uncalibrated weighing machine easily explained for the weight discrepancy.

[49] There was no dispute that SP3, the chemist who analysed the seized drug used calibrated weighing machine to determine its weight.

B

[50] Thus, the obvious explanation for the discrepancies in the weight of the drug exhibit as obtained by SP1, SP7 and SP9 was due to their use of uncalibrated weighing machines as compared to the weight obtained by SP3 who used a calibrated weighing machine. And although their explanations might not have been necessary as stated earlier, nevertheless explanation was given or could easily be inferred from their testimonies unlike in Zaifull case where no explanation was available, offered or could be inferred from the facts and circumstances available. In fact, in the present case this weight issue was also considered by the learned trial judge and he ruled that there was no break in the chain of evidence thus rendering the weight issue immaterial in coming to his decision.

C

D

[48] The court in the case of *Mazlan bin Mustaffa v Pendakwa Raya* [2015] MLJU 2127 held that there was no doubt that the drug exhibits seized from the appellant and as examined by the chemist were the same drugs exhibits that the appellant was charged with. There was no break in the chain of evidence and the drug exhibits were positively identified by the prosecution witnesses.

E

[49] We were also satisfied that there is no merit on the issue of discrepancy on the identity of the bag. The appellant submitted that there was no 'tag' with the said bag to prove the bag belonged to the appellant. In this regard, PW2 in his evidence during cross-examination had clearly stated that there was no baggage tag on the bag because the bag was hand carried by the appellant. In other words, indicating that it was not checked luggage. He further stated that there is no requirement for the hand carried bag to have baggage tag and the bag can be carried into the plane (see: pp 13–14 of appeal record (Vol (2))). We were of the view it is common knowledge that a hand carried bag does not have a baggage tag and can be carried into the plane.

F

G

[50] We were also satisfied that the appellant's claim that his bag is a light brown coloured bag with the brand 'POLO' did not have merit. PW4 in his evidence during examination-in-chief stated that the bag P13 is a 'Leaves King' brown trolley bag (see: p 32 of the appeal record (Vol (2))). In fact, photograph of the bag at number 12 at p 28 of the appeal record (Vol (3)) clearly shows that the bag is a brown colored bag with the brand 'Leaves King'. We turned at p 42 of the appeal record (Vol (2)), during cross-examination on PW4, counsel for the appellant asked PW4 that in his investigation what is the colour of the 'Leaves King' bag seized from the appellant and the answer by PW4 is brown. Obviously, the bag P13 is 'Leaves King' which the appellant had knowledge and it was not a 'POLO' bag as raised in this appeal.

H

I

[51] We noted that the learned judge had carefully and thoroughly considered the evidence in defence by the appellant. In her grounds of judgment, she had laid down the defence of the appellant that his bag could have been switched and taken away by any of the individuals (which he claimed as '5 Indian passengers consisting of 3 Malaysian Indians and 2 Indian nationals') when he left it unattended upon SP2 was asking him to step aside to check his passport. More importantly, it was conceded by the appellant that the main crux of the defence that his actual bag could have been switched and taken away by somebody else, was not put in his witness statement ('DWS1') and was never disclosed at the prosecution stage by putting it to PW2 during cross-examination of PW2. Therefore, it was correct for the learned judge to make a finding that the defence of the appellant was belated and amounted to an afterthought.

[52] The need for disclosure of the defence at the prosecution's stage was discussed in the judgment of the Supreme Court in *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561; [1992] 4 CLJ 2086 which was decided as follows:

> The trial judge appreciated correct law when he held, as he did in fact hold, that the defence are entitled, through cross examination of prosecution witnesses, to put its case at the earliest possible stage. Indeed, it behoves the defence to do so, for we need hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the witness box or the dock, so that the prosecution is taken by surprise, the accused runs the risk of being criticised for having kept his defence 'up his sleeve', so to speak, and it being branded as a recent invention.

[53] The learned judge had not committed any error of law in evaluating the defence evidence as she had evaluated both the version of the prosecution and the version of the defence in coming to the conclusion that it was impossible to give the slightest credence to the appellant's version. Much more, when the testimony of the appellant in his defence had contradicted his own witness (DW2 — Sgt Paneer Chelvam). DW2 was clear in his evidence that the appellant only complained that exh P13 was not his bag when he was escorted to the narcotics office, and not when the bag was opened under the instructions of PW2. Further, DW2 himself had confirmed that the appellant had never mentioned to him anything about the presence of five Indian passengers nearby him when the appellant was first arrested.

[54] On the issue relating to several tears found on the plastic package contained drugs produced in court, the appellant referred to the evidence of PW2 that there was only one tear found on the plastic package however, PW4 was not sure how many tears found on the said package. The appellant submitted that PW4 as an investigating officer should be in a position to know the number of tears found on the plastic package because he had identified the said package during trial. The appellant claimed that based on that reason that

there is miscarriage of justice. The appellant submitted that the learned judge had made an error in her finding on this issue. Further, according to him, the photographs exh P4 showed more than one traces of cellophane tape which means there were more than one tear found on the plastic package. The other photograph which showed the said drugs was doubtful because the tear was bigger. It is the appellant's case that there was clear discrepancy of the tear found on the plastic package which contained the said drugs.

[55] The appellant cited the case of *Pendakwa Raya lwn Bazleh Saeid Saleh dan satu lagi* [2014] 5 MLJ 816 where the Court of Appeal upheld the High Court's finding that there were several tears found on the plastic package produced in court. SP6' evidence that he had merely made a small tear at the top edge of the plastic package did not tally with the physical condition of the plastic package produce during trial. SP3, SP6 and SP5 had no knowledge of the presence of several tears on the exhibits. The exhibits were tampered with and as a result there was doubt on the identity of the drugs which was the subject matter of the charge against the respondents.

[56] We noted that the learned judge had made careful examination of the plastic package containing the drugs and found that there was no factual basis for the complaint made by counsel as there was only one tear on the said package (see: para 26 of the grounds of judgment at p 18 of the appeal record (Vol (1))). At pp 45–47 of the appeal record (Vol (2)), the notes of proceeding shows that the learned judge had examined the defence counsel and prosecution related to the tears in question. The defence counsel relied on picture No 10 (at p 27 of the appeal record (Vol (3))). The learned judge confirmed that the raiding officer (PW2) in his oral evidence stated that he made only one opening. The defence counsel stood by his contention that there is more than one holes because PW4 said he could not confirm. However, the learned judge stated that the holes cannot be seen on picture 10. We had a look at picture 10 and we too did not see many holes on plastic package containing the drugs.

[57] The learned judge found no merit in this submission as the prosecution was entitled to rely on the oral evidence of PW2 to establish that exh P13 was seized from the appellant and that it contained the drugs. There is no requirement in law for PW2's evidence to be corroborated by independent evidence as his evidence was cogent and consistent with the other evidence. We found the learned judge had made her finding of facts on this issue and she did not commit any error in her finding.

[58] We found the issue raised by the appellant that the exhibits such as his wallet, a set of key and other things inside the bag were not listed in the seizure lists and not produce during the prosecution case had cause break in chain of

evidence has no merit. In our view the failure of the prosecution to produce exhibits not listed in the seizure lists and not produce during the prosecution case in the present case had not caused gap or break in chain of prosecution evidence. The findings made by the learned judge was clear that she found the appellant was in possession of the dangerous drugs based on the facts that he was in custody and control of the bag (exh P13) which contained the dangerous drugs and therefore the presumption under s 37(d) of the Act was applied. The learned judge also had made the finding of trafficking against the appellant by way of presumption under s 37(da) of the Act as the weight of drugs found in his possession was in excess of the weight which triggers the presumption of trafficking.

[59] Based on the reasons stated above, it was our view that there is no merit in the appeal by the appellant here as there is no appealable errors or misdirection by the learned judge which warrants appellate interference.

[60] The principle of law governing appeals in criminal cases on questions of fact is well established, in that the appellate court will not interfere unless the balance of evidence is grossly against the conviction especially upon a finding of a specific fact involving the evaluation *of the evidence of a witness founded on the credibility of such witness* (see: *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84). The court, inter alia, recognised that an appellate court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility (see: *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79).

CONCLUSION

[61] Having regard to the totality of the evidence, the surrounding circumstances and the probabilities of the case, it is our unanimous finding that the charge had been proven beyond reasonable doubt against the appellant. For all the reasons above stated, we hold that the conviction is safe and amply supported by cogent and overwhelming evidence on record. Therefore, the appellant's appeal is dismissed and the conviction and sentence of the High Court is hereby affirmed.

Appeal unanimously dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar